

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL TODD PATTERSON,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 258925

Wayne Circuit Court

LC No. 04-008017-01

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to sixteen months to four years' imprisonment for the felonious assault conviction and to a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant and the victim, Terry Porter, knew each other, and defendant often visited the home where the victim lived with his brother, Anthony Green. Over the course of a few weeks, defendant and the victim had been engaged in an ongoing disagreement over the sale of a cellular telephone. Defendant sold a telephone to the victim for \$20, but the victim was unable to have the telephone activated. Therefore, he wanted defendant to return the \$20. According to the victim, defendant stopped speaking to him and would not return the money. According to defendant, he agreed to return the money if the victim gave back the telephone. Because the victim did not return the telephone, defendant did not return the \$20. An impasse thus existed.

The victim testified that, on June 7, 2004, between 7:00 and 8:00 p.m., he had three encounters with defendant. First, defendant and his pitbull came by Green's house. The victim, who had been drinking beer, attempted to make defendant's dog growl and bark. Defendant subsequently left the area. Later, however, defendant walked past Green's house with his friends. He was carrying a standard-sized baseball bat, and he stared at the victim. While defendant did not approach the victim, the victim felt threatened and was concerned. Approximately 20 minutes after that incident, defendant came near Green's house for the third time. The victim admitted that he left Green's porch, approached defendant, and started a verbal confrontation about the cellular telephone deal. During the argument, the victim and defendant came close to each other, and defendant pulled a .38 caliber gun from his pants. He poked the gun into the victim's stomach. The victim, fearing that he would be shot, grabbed the front of

the gun. Defendant then fired his weapon. The bullet almost completely severed the victim's thumb from his hand. Medical records and police testimony confirmed that the victim sustained a gunshot wound to his hand. After the initial shot, defendant fired the gun two more times at the ground in the area where the victim was backing away. The victim subsequently fell to the pavement and suffered injuries to his face.

Green, who had exited his house, observed defendant shoot the victim and then shoot at the ground two additional times. Green testified that, before defendant shot the gun, the victim put his hand up, as if he were trying to grab the gun or hit defendant. Green confirmed that the victim hit his head on the ground when he fell.

Defendant testified and agreed with the basic sequence of events set forth by the victim. Defendant admitted that he and the victim argued over the \$20 on June 7, 2004. Defendant admitted that he was near Green's house on three occasions, although he provided a different time frame than the victim provided. Defendant claimed that he walked his dog past Green's house at approximately 4:00 p.m. The victim teased the dog, and defendant had to restrain the dog to prevent it from biting the victim, whom defendant described as being so intoxicated that he could not stand properly. Defendant claimed that he later walked by with a miniature souvenir bat, not a regular bat. Defendant admitted that he thought about hitting the victim with the bat, but ultimately decided not to do so. Instead, he left the area. Still later, however, defendant walked to a store located near Green's house. Defendant estimated that this occurred between 6:30 and 7:00 p.m. He claimed that, on his way back from the store, the victim confronted him. Defendant's story from that point substantially diverged from the victim's story. Defendant claimed that he and the victim argued about \$20 and then began wrestling. During the physical altercation, the victim fell and hit his head. While the victim lay unconscious, defendant left the area. Defendant denied that he had a gun or shot the victim. Defendant's mother, testifying on his behalf, claimed that defendant did not have a gun. She admitted, however, that she heard gunshots on June 7, 2004, at approximately 6:30 or 7:00 p.m. She did not know where defendant was at the time she heard the shots.

Although defendant was charged with assault with intent to commit murder, the jury convicted him of the lesser offense of felonious assault.

Defendant first argues that his attorney rendered ineffective assistance of counsel in several respects. Our review of these claims is limited to errors apparent from the record because no evidentiary hearing was held with respect to the claims. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial that it deprived the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant initially argues that counsel was ineffective for failing to provide a timely notice of alibi defense. He claims that this omission precluded testimony from his alibi witness, who would have provided a substantial defense. In support of this argument, defendant has provided his sister's affidavit. She indicates that she was available to testify but was informed

by defense counsel that she could not do so. She states that if she had been called as a witness, she would have testified that “sometime around 7:00 p.m. or before it was dark outside, I picked up my brother in my car near our cousin’s house on Roselawn and brought him to my house where he spent the night.” Defendant argues that, while the time of the shooting was in dispute, the victim estimated that it occurred at 7:00 p.m. Thus, in defendant’s view, the testimony of his sister would have been a substantial defense to the claim that he was not the shooter. Defendant claims that defense counsel’s failure to file a timely notice of alibi defense was improper and prejudicial.

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to introduce evidence or call certain witnesses constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense, which is a defense that may have affected the outcome of the trial. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In this case, we simply cannot conclude from the record that the alibi defense was substantial or capable of affecting the outcome of trial. Defendant acknowledges that the time of the shooting was not established with certainty. The victim testified that his encounters with defendant took place between 7:00 and 8:00 p.m. He stated that “it was getting dark” when the shooting occurred. Defendant placed himself at the scene between 6:30 and 7:00 p.m. Defendant’s mother heard gunshots between 6:30 and 7:00 p.m. Green testified that the police took a “little while” to arrive after the shooting. There was no testimony regarding the exact times when the police were called and when they arrived. The first officer to arrive at Green’s house testified that he was working at approximately 9:00 p.m. on June 7, 2004. Later, he testified that “at some point” that day, he went to the shooting scene. The affidavit provided by defendant’s sister indicates only that “sometime around 7:00 p.m. or before it was dark outside, I picked up my brother in my car.” There was no testimony indicating when it became dark on June 7, 2004. Because there was no clear evidence indicating when the shooting occurred and because the affidavit was not specific in terms of timing, we cannot conclude that the alibi testimony would have substantially supported defendant’s claim that he was not present at the time of the shooting. Defendant has not met his burden of demonstrating that, if the alibi testimony had been presented, there is a reasonable probability that the outcome of trial would have been different. *Stanaway*, *supra* at 687-688.

Defendant next argues that trial counsel was ineffective for failing to argue evidence that would have supported his defense, specifically evidence that neither the victim nor Green gave defendant’s name to the responding officers. Defendant fails to argue or demonstrate that, had defense counsel’s closing argument been more persuasive or comprehensive, there is a reasonable probability the outcome of his trial would have been different. See *id.* Thus, he has failed to meet his burden of proof with respect to this claim. *Id.* There was testimony on the record that, at the scene, Green provided defendant’s name to the police and that, while the victim only provided a description of defendant, he was complaining of pain and smelled of intoxicants when he spoke to the police. In light of that testimony, an argument that the victim and Green were not credible because they failed to identify defendant at the scene would not have been entirely accurate or particularly persuasive.

Finally, defendant argues that counsel was ineffective for failing to object to the prosecutor’s closing argument, which defendant maintains “could have misled the jury with

regard to felony firearm.” Immediately after arguing that the evidence was sufficient to support a charge of assault, the prosecutor argued that if the jury believed that defendant had a gun and committed a felony or attempted to commit a felony, it would have to return a guilty verdict on the felony-firearm charge. The prosecutor argued that defendant clearly had a gun on the night in question. A prosecutor is free to argue the evidence and inferences arising therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Contrary to what defendant argues, the prosecutor did not misstate the elements necessary to convict defendant of the felony-firearm charge. MCL 750.227b provides that a person who carries or has in his possession a firearm when he commits or attempts to commit a felony is guilty of the charge. As such, the prosecutor’s argument, which was based on the evidence and accurately reflected the elements of the charge, was not objectionable. Defendant cannot demonstrate that counsel’s failure to object was unreasonable. *Pickens*, *supra* at 303. More importantly, defendant has not demonstrated the requisite prejudice. *Id.*; *Stanaway*, *supra* at 687-688. He has not demonstrated that, if counsel had objected to the prosecutor’s argument, there is a reasonable probability that the outcome of his trial would have been different. To the contrary, defendant does not dispute that the trial court properly instructed the jury with respect to the felony-firearm charge. Moreover, the trial court instructed the jury that the case was to be decided on the basis of the properly admitted evidence and the trial court’s instructions on the law. It specifically instructed the jury that the lawyers’ arguments were not evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, any prejudice stemming from the prosecutor’s argument was cured. Reversal is not required.¹

Defendant next argues that the trial court erred in departing from the sentencing guidelines and denying his motion for resentencing. The recommended minimum sentence range calculated under the legislative guidelines for defendant’s felonious assault conviction was 0 to 17 months. Defendant was sentenced to 16 months to 4 years’ imprisonment. Defendant moved for resentencing, arguing that his felonious assault sentence should not have been greater than 12 months, to be served in jail, under the intermediate sanction rule of MCL 769.34(4)(A). The trial court disagreed and ruled that, if substantial and compelling reasons existed for the imposed sentence, resentencing was not required. The trial court then articulated “substantial and compelling reasons” for the 16-month-to-4-year sentence. It also filed a written departure evaluation, which stated:

The defendant is very dangerous to society. He shot his friend – shot at him several times over \$20 and pistol whipped him. The victim sustained a hand injury in blocking his head but could have easily been killed.

On appeal, defendant argues that the cited factors were not substantial and compelling reasons to warrant a departure from the intermediate sanction requirements of MCL 769.34(4). In response, the prosecutor argues that the trial court was required to commit defendant to the Department of Corrections because of his felony-firearm conviction and, therefore, the intermediate sanction rule was unavailable. According to the prosecutor, because defendant was

¹ We also reject defendant’s alternative argument that a remand for an evidentiary hearing is appropriate in this case.

sentenced within the minimum sentence range under the guidelines, his sentence must be affirmed. MCL 769.34(10). Alternatively, the prosecutor argues that defendant's felonious assault sentence was a proper departure from the intermediate sanction requirements of MCL 769.34(4).

The prosecutor's argument that the intermediate sanction rule was unavailable to defendant is unpreserved, abandoned, and waived. At the hearing on defendant's motion for resentencing, the prosecutor expressly agreed that the intermediate sanction rule applied and argued that the trial court was required to sentence defendant to an intermediate sanction unless the court articulated substantial and compelling reasons for a departure. A deviation from a legal rule is error unless that rule has been waived. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). By expressly agreeing that the intermediate sanction provision applied and by not raising the novel legal issue now raised, the prosecution waived its right to argue on appeal that the intermediate sanction rule does not apply. *Id.* at 214-215. Furthermore, when, as here, a party provides cursory treatment to an issue with little or no citation to relevant authority, the issue is deemed abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

We note that defendant's convictions were for distinct crimes. The felony-firearm conviction required a mandatory minimum sentence of two years' imprisonment to be served consecutively with and preceding any term of imprisonment imposed for the underlying felony. MCL 750.227b. Defendant was sentenced to the mandatory two years' imprisonment in accordance with MCL 769.34(2)(a), which provides that "[i]f a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute." Defendant was additionally sentenced, however, for felonious assault. Because that crime does not have a mandatory minimum sentence required by statute, the sentencing guidelines were calculated to determine the appropriate minimum sentence.

The intermediate sanction rule, MCL 769.34(4), provides:

Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

The parties do not dispute that the upper limit of the recommended minimum sentence range for defendant's felonious assault conviction, as calculated under MCL 777.1 *et seq.*, was

17 months. Thus, the trial court was required to articulate substantial and compelling reasons for departing from the requirements of the intermediate sanction rule.²

A “substantial and compelling” reason is an objective and verifiable reason that “keenly” or “irresistibly” grabs a court’s attention, is “of considerable worth” in deciding the length of the sentence, and exists only in exceptional cases. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (internal citation and quotation marks omitted).

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. [*Id.* at 264-265 (internal citation and quotation marks omitted).]

When a trial court articulates multiple reasons for a departure, this Court must determine whether the various reasons are substantial and compelling, and, if some are not, it must determine whether the trial court “would have departed to the same degree on the basis of the substantial and compelling reasons alone.” *Id.* at 260.

MCL 769.34(3) provides that all of the following apply to a departure:

(a) The Court shall not use an individual’s gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

In this case, the trial court filed a written departure evaluation, outlining “substantial and compelling” reasons for the sentence imposed. It first stated that defendant was “very dangerous to society.” However, a trial court’s conclusion that a defendant is a danger is not, itself, an objective and verifiable factor. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). The trial court next indicated that defendant “shot his friend,” “did so several times over \$20,” and “pistol whipped him.” The fact that defendant shot a weapon was already considered

² Because the issue is not properly before us, we express no opinion on the merits of the prosecutor’s argument that the mandatory sentence of imprisonment for felony-firearm obviated the trial court’s duty to articulate substantial and compelling reasons for departing from the intermediate sanction rule.

by offense variable (OV) 1, MCL 777.31, which was scored at 25 points because a firearm was discharged at or toward a human being. Additionally, defendant was scored five points for OV 2, MCL 777.32, which is scored when an offender possesses a pistol. The trial court did not make a finding that either of these factors was inadequately considered by the sentencing guidelines. Thus, a departure should not have been based on those factors. MCL 769.34(3)(b). Further, there was no evidence that the victim was “pistol whipped,” and the fact that the victim was shot over the sum of \$20, although objective and verifiable, does not, standing alone, keenly and irresistibly grab our attention such that a departure was warranted.

With regard to the court’s finding that defendant shot the victim several times, the evidence at trial revealed that defendant actually shot the victim one time. However, the additional shots fired by defendant were fired at the ground where the victim was backing away. Moreover, the trial court additionally articulated that the victim “sustained a hand injury in blocking his head but could have easily been killed.” The record supports that the victim sustained a gunshot wound to his hand when he grabbed the front of the pistol, which was pointed at his stomach by defendant and was actually poking into his stomach. The gunshot wound almost completely severed the victim’s thumb. While the court may have erred in stating that the victim was “blocking his head,” the court properly concluded that the victim could easily have been killed if he had not engaged in a defensive move. Although defendant was scored ten points for OV 3, MCL 777.33, for causing bodily injury requiring medical treatment to the victim, the potentially fatal nature of the confrontation was not accounted for by the guidelines. Thus, the trial court did not err in concluding that the circumstances of the injury constituted a proper basis for departure. We conclude that the trial court articulated substantial and compelling reasons to warrant its departure from the intermediate sanction requirement of MCL 769.34(4). Moreover, we are convinced that the trial court’s departure would have been the same even in the absence of the improper departure factors discussed above. See *Babcock, supra* at 260.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter